THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 24.04.2007

+ **BAIL APPLN. 163/2006**

VED PRAKASH @ KALU (JC) ... Petitioner

versus -

STATE THROUGH THE NCT (DELHI) ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr N. Hariharan
For the Respondent/State : Mr S.K.Saxena Spl. P.P. with Ms Manisha Sharma

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. This bail application has been filed in respect of FIR No. 21/1999 dated 23.1.1999 registered at police station Mandawali concerning the murder of Shivani Bhatnagar. The petitioner is accused of having being party to the conspiracy to the murder of the said Shivani Bhatnagar. He is accused of having committed offences under Section 302, 120B, 411, 403, 404, 201 IPC. The alleged murder of Shivani Bhatnagar took place on 23.12.1999. The petitioner was arrested on 3.10.2002 and he has been in custody since then.

2. This is the second bail application moved by the petitioner before this Court. The first bail application of the petitioner was dismissed as withdrawn on 10.12.2003 as, at that stage, the prosecution witnesses qua the present petitioner were yet to be examined.

3. The prosecution case is based entirely on circumstantial evidence. Mr Hariharan, the learned counsel appearing on behalf of the petitioner submitted that all the witnesses pertaining to the petitioner have now been examined. He submitted that the petitioner has clean antecedents. He submitted that an FIR No. 390/2001 in which the petitioner was allegedly involved, was a false case and a final report has been filed therein. Mr Hariharan submitted that the alleged murder took place on 23.12.1999 and it is almost three years later that the petitioner was arrested on 3.10.2002. On 6.10.2002 the petitioner is alleged to have made a disclosure statement. However, no recovery was made pursuant to the said statement. On 8.10.2002 a second disclosure statement is said to have been recorded pursuant to which, it is alleged that a camera was recovered from the petitioner's aunt's house at Gurgaon. The camera allegedly bore initials “RB” which, according to the prosecution, stood for Rakesh Bhatnagar, who was the husband of the deceased Shivani Bhatnagar. Mr Hariharan pointed out that between 30.7.2002 and 28.9.2002 all the other co-accused had been arrested and, therefore, it would

not be an act of prudence on the part of the petitioner to continue to hold the camera when the co-accused were being arrested. He further referred to the cross-examination of Rakesh Bhatnagar with regard to the camera and tried to show that there were discrepancies in the evidence and in the ownership of camera.

4. Mr Hariharan further submitted that there were no public witnesses for the recovery of said camera. He then referred to the deposition of PW188 in an attempt to show that no effort was made to get the camera identified by Rakesh Bhatnagar as no TIP was conducted. Reference was also made to the deposition of PW85, the maid at Rakesh Bhatnagar's house. He submitted that the said PW.85 had stated that on the said day in the morning, there was no camera on the fridge, where it was usually kept.

Summoning up his arguments, Mr Hariharan submitted that the only evidence, if at all with regard to the petitioner, is the alleged recovery of the camera. He submits that the petitioner is an agriculturist/property dealer now aged about 37 years and has clean antecedence and, therefore, he would be entitled to be released on bail.

6. Mr S.K. Saxena, the Special Public Prosecutor, has strongly opposed the bail application. He submitted that as per the prosecution case the murder of Shivani Bhatnagar was committed at the instance of co-accused R.K.

Sharma after a conspiracy was hatched between him and Shri Bhagwan, Sat Prakash, Ved Prakash (the petitioner herein), Ved Sharma and a killer (Pradeep Sharma) was arranged for the same. He submitted that this was a case of criminal conspiracy which had been pieced together by the prosecution after years of investigation. It involved numerous prosecution witnesses. He submitted that Ved Prakash alias Kalu (the petitioner herein) is co-accused Shri Bhagwan's sister's son. He also submitted that the alleged killer Pradeep Sharma is the nephew of co-accused Sat Prakash. The prosecution case is that this was a case of premeditated murder committed as a part of a conspiracy at the instance of the accused R.K. Sharma. On 13.1.1999 a few days prior to the murder, Shivani Bhatnagar, who was known to R.K. Sharma, was called to Ashoka Hotel and was shown to the co-accused. He also submitted that it was not that Rakesh Bhatnagar had not mentioned about the camera at all. He refers to the statement recorded under Section 161 of the Code of Criminal Procedure, 1973 recorded on 27.1.1999 to indicate that the camera with initials "RB" was mentioned. He submitted that the camera assumed importance because it may have contained a film having pictures of co-accused R.K. Sharma. He further submitted that in the disclosure statement of co-accused Shri Bhagwan, the petitioner was named. It was also pointed out by him that the petitioner (Ved Prakash) was known to co-accused R.K. Sharma and Shri D.P. Singh (PW.106) because there was some property transactions and Ved Prakash was not a stranger to R.K. Sharma. He further submitted that there were numerous

landline conversations between R.K. Sharma and Shri Bhagwan, who was the uncle of the present petitioner. R.K. Sharma had enlisted all these persons and Shivani Bhatnagar was shown to them for the purpose of identification at Ashoka Hotel on 13.1.1999. After 13.1.1999 R.K. Sharma is alleged to have gone to Poona for a course and he did not return to Delhi till after 23.1.1999. It is, therefore, the prosecution case that whatever instructions were to be given to the co-conspirators and the killer, were given on 13.1.1999 itself.

7. Mr S.K. Saxena also submitted that according to the prosecution, it was the job of Ved Prakash (the petitioner herein) to destroy the film which was in the camera. He submitted that the petitioner does not deserve bail on merits as well as on the ground that he was absconding during the course of investigation till October, 2002.

8. In rejoinder Mr Hariharan referred to the decision of the Supreme Court in ***Jayendra Saraswathi Swamigal v. State of Tamil Nadu***: ***(2005) 2 SCC 13***. With reference to the said decision, he submitted that in view of Section 10 of the Indian Evidence Act, 1872, if prima facie evidence of the existence of a conspiracy is given and accepted, the evidence of acts and statements made by any one of the conspirators in furtherance of the common object is admissible against all. However, he pointed out that the Supreme Court observed that before a conspirator's acts or statements can be used against his co-conspirators, there should first be a prima facie evidence that the

person was a party to the conspiracy. He submitted that in the present case there was nothing to show that the petitioner was a party to the conspiracy apart from the alleged confessional statement themselves. Therefore, he submitted that it cannot be said that the petitioner was a conspirator or a party to the conspiracy in the murder of Shivani Bhatnagar. Mr Hariharan then referred to the decision of the Supreme Court in the ***State of Karnataka v. Venkatesh and Others:*** ***1992 SCC (Crl.) 329*** to submit that failure of an accused to appear before the police cannot give rise to any inference of his guilt and, therefore, the alleged circumstance of abscondence cannot be used against him. He submitted that no attempts were made by the police to visit the petitioner or to arrest him and, therefore, there was no question of the petitioner absconding as has been alleged by the prosecution.

9. Mr Hariharan then referred to the decision of the Supreme Court in the case of ***Gambhir v. State of Maharashtra***: ***1982 SCC (Crl.)431*** to indicate the tests that have to be applied in cases of circumstantial evidence before a conviction can be sustained. With reference to the said decision he submitted that when a case rests upon circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so

complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. He further submitted that the circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

10. After having considered the arguments advanced by the counsel for the parties and the decisions referred to by them, I am of the view that there is no difficulty with the principles which have been laid down in the decisions which have been referred to by Mr Hariharan. However, those principles would be more applicable at the stage of a judgment being passed by the trial Court upon an appreciation of the entire evidence on record. At present I am concerned with an application for bail. In a recent decision the Supreme Court in the case of ***State of U.P. v. Amarmani Tripathi***: ***(2005) 8 SCC 21*** made it clear that the matters to be considered in an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii)

reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.

11. Considering these parameters, I find that since all the witnesses qua the petitioner have been examined, there can be no apprehension of the witnesses being tampered with. There also does not seem to be any reasonable likelihood of the offence being repeated. So also the question of danger of the accused absconding or fleeing, if released on bail. However, I feel that the factors which weigh against grant of bail are the questions of a strong prima facie case against the accused. The nature and gravity of the charge and the severity of the punishment in the event of conviction. Taking a prima facie view of these factors as also taking note of the fact that the trial is towards its end, I do not think that it would be appropriate to grant bail to the petitioner at this stage. This application for bail is rejected with the hope that the trial would be concluded at an early date. It is made clear that nothing expressed in this order shall be taken into consideration by the trial Court while delivering its judgment on the case.

12. This application is dismissed.

BADAR DURREZ AHMED
(JUDGE)

April 24, 2007
J